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No. 92

In the

# Supreme Court of the United States

COMMISSIONER OF INTERNAL REVENUE
*Petitioner,*

vs.

NORTH TEXAS LUMBER COMPANY,
*Respondent.*

*On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit*

## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

The statement of petitioner in his brief are sufficient to present the only question at issue in the case. Respondent does not deem the second specification of error by petitioner as accurately stating the question and respondent submits the following as the question presented by the record in this case:

The purchaser being solvent and willing to carry out the contract of December 27, 1916, and having accepted the title to the lands therein mentioned and having signified its acceptance of the option on December 30, 1916, which was in turn accepted and acted on by seller, and the seller at said time being willing and able to comply with said contract, and as the seller

kept its books upon an accrual basis, and as all the events occurred necessary to fix the amount of the profits and determine the liability of the tax payer on December 30, 1916, the profits accrued on said date and are taxable for the calendar year 1916.

## ARGUMENT

There is quite a distinction made, and which clearly exists, between a case where the tax payer keeps his books on a cash basis and where he keeps them on an accrual basis. The latter method is the one followed by respondent and the Honorable Commissioner seems to make no distinction between books kept on a cash basis, and books kept on an accrual basis. In 1921 the Honorable Commissioner promulgated certain regulations and rulings and among them is Article 52, which reads as follows:

> "When included in gross income.—Gains, profits and income are to be included in the gross income for the taxable year in which they are received by the taxpayer, unless they are included when they accrue to him in accordance with the approved method of accounting followed by him."

In Cumulative Bulletin No. 2, January-June 1920, on page 80, the department stresses the fact that an action for specific performance would not have put the vendee in possession during 1917, because he was not under the contract entitled to possession until 1918, and at page 84, Opinion 988, says:

> "No realization of gain or loss arises from a mere contract to sell real estate in the future. The sale is held to occur at the time a deed passes, or at the time possession and the burdens and benefits of ownership are from a practical standpoint transferred to the buyer, whichever occurs first."

Petitioner cites the case of

*Gober vs. Hart, 36 Texas 139.*

The contention of respondent is sustained by that case for in that case the Court says:

> "When the vendor sues for the purchase-money for real estate, he should show that he has made the conveyance in full compliance with the terms of the sale, or that he is now ready and willing and able to make such conveyance on the payment of the purchase money."

On December 30, 1916, respondent was ready and willing and able to make conveyance on the payment of purchase money. In fact had been preparing the various instruments since December 27th, 1916. (R. p. 48). There is nothing in the option and contract making the delivery of the deed a condition precedent to the payment of the purchase money. The vendee was not entitled to the deed until he paid the purchase money. To the same effect is the other Texas case cited by petitioner, *Clifton vs. Charles, 116 S. W. 120*, which says:

> "Under an executory contract for the sale of land, the obligations of the parties are mutual and reciprocal; the vendor, if he owns the land, on tender of the purchase money, being required to execute a conveyance according to the agreement and the vendee, on tender of a conveyance, being required to render the consideration."

The rule laid down in 39 Cyc. pp. 1641 and 1642, sustains respondent in this case, particularly in regard to the qualifications and exceptions to the rule. As this transaction was wholly a cash transaction and the title had been accepted, it makes the instant case stronger than those in the books.

The attention of the Court is called to *Sewell vs. Underhill*, (N. Y. Court of Appeals). *197 N. Y. 168, 90 N. E. 430, 27 L. R. A. (N. S.) p. 233.* In that case, the delivery of the deed was postponed until a map could be prepared. A fire occurred before the map was prepared and before the deed was actually delivered, and title was held to be in vendee. The original English case, *Paine vs. Moller, 6 Ves. Jr. 349*, which has been followed by the great majority of American courts, is also quite similar to the instant case. As quoted in the New York Court of Appeals case, this case states:

> "Somewhat like the present case, there, AFTER THE ACCEPTANCE OF THE TITLE, a delay occurred in the preparation and execution of the deed,"

but the English case held that the loss fell on the vendee.

The authorities cited in the notes at *43 L. R. A. (N. S.) p. 51* is in line with this authority.

*Davidson & Case Lbr. Co. vs. Motter*, (U. S. District Court, District of Kansas, Second Division, March 2, 1926) reported in Prentice-Hall Service, 1926, at page 1356, is a case directly in point. We refer to this

case without quotations as it would make this brief too long to quote the entire opinion and it is difficult to condense same.

Possession of this wild timber land which was the subject of the sale was surrendered to the purchaser, as far as it was possible on the part of the vendor to do so, on December 30, 1916. (R. p. 43). The Vendor vacated possession, ceasing to exercise any ownership, or dominion, over same and the purchaser could use such property in such manner as it saw fit. Vacating the property so as to not interfere with the entry and absolute possession of the purchaser is all that a vendor can ever do. He cannot control the action of the purchaser. No other person was in possession of the property holding adversely to seller or purchaser; and all of the right, title and ownership and possession of the vendor was vested in the vendee, or purchaser, by reason of the acceptance of the option.

Respondent respectfully submits that the judgment of the Honorable United States Circuit Court of Appeals for the Fifth Circuit in this case is fully sustained by the decisions of this Honorable Court in *U. S. vs. Anderson, 269 U. S. 423*, and *American Nat. Co., Receiver, vs. U. S., 274 U. S. 99*, and respondent

respectfully submits that the judgment of the United States Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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